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Nos. 95-1625; 95-1626

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In The

Supreme Court of the United States

October Term, 1996

LUCIOUS ABRAMS, JR., et al., and
THE UNITED STATES OF AMERICA,

Appellants,

v.

ZELL MILLER, PIERRE HOWARD
AND LEWIS MASSEY,

Appellees,

and

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Georgia

BRIEF OF APPELLEES MILLER, HOWARD AND MASSEY

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QUESTIONS PRESENTED

I. Whether the district court abused its discretion or deviated from the constraints of *Upham v. Seamon* in adopting the redistricting plan here.

II. Whether the remedial plans advocated by appellants are mandated by Section 2 principles.

III. Whether the slight population deviation in the court's plan is within constitutional limits.

IV. Whether the district court's remedy was violative of Section 5 of the Voting Rights Act.

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I. STATEMENT OF THE CASE.

A. Proceedings Below.

Plaintiffs filed their complaint challenging Georgia's eleventh congressional district on *Shaw* grounds on January 13, 1994. The Department of Justice and several voters represented by the ACLU also sought, and were granted, permission to intervene. A trial on the merits was held July 21-28, 1994, in Savannah, Georgia. The district court entered judgment on September 12, 1994, in favor of plaintiffs, with Judge J.L. Edmondson dissenting.

A notice of appeal was filed by the Governor, the Lieutenant Governor and the Secretary of State on September 14, 1994. The private intervenors and the Department of Justice subsequently filed notices of appeal as well. This Court noted probable jurisdiction of all appeals, and the cases were heard on April 19, 1995. On June 29, 1995, this Court issued its opinion affirming the judgment of the district court and holding that the eleventh congressional district was unconstitutional because it was predominantly the product of racially segregative motivations. *Miller v. Johnson*, 132 L.Ed.2d 762 (1995).

On July 7, 1995, the Governor of the State of Georgia issued a call for a special session of the General Assembly to consider remedial reapportionment legislation. Pursuant to that call, the General Assembly was in session from August 14, 1995 to September 12, 1995. While the General Assembly was able to enact new plans for the House and Senate that were necessary because of similar constitutional defects in those plans, the legislature was unable to agree upon a new congressional reapportionment plan.

On August 22, 1995, the district court held a hearing to determine how best to proceed in resolving the issue of remedy. Subsequently, in preparation for its own adoption of a remedial reapportionment plan, the district court requested that the parties submit various redistricting proposals. (Orders of October 17 & 20, 1995) Pursuant to these requests, both the plaintiffs and the *Abrams* intervenors submitted several proposals. Also, defendant Thomas B. Murphy, the Speaker of the Georgia House of Representatives, submitted a proposal. Neither the United States nor any of the defendant State executive officers (the Governor, the Lieutenant Governor and the Secretary of State) submitted proposals. These State defendants believed it inappropriate for them to submit such proposals since, under State law, they had no authority to exercise this legislative function. (R. Vol.12, 343)

Shortly after this Court's decision, the plaintiffs moved to amend their complaint to also challenge the second congressional district, contending that it was borne of the same type of illegal racial gerrymander as the eleventh district. The district court proceeded on October 30, 1995, to receive additional evidence regarding the second district. The State's defense was necessarily a limited one in light of this Court's previous ruling, the earlier findings of the district court, and the facts pertaining to the second district. The United States did not contest plaintiffs' claim that the second district was unconstitutional.

After receiving additional evidence on the second district, the trial court moved immediately into the remedy hearing, which was concluded on October 31, 1995.

All parties were allowed at the hearing to introduce what additional evidence they desired on the issue of remedy, to advocate their plans and suggestions, and to cross-examine the witnesses of the opposing parties.

On December 1, 1995, the district court issued an order finding the second district unconstitutional. (U.S. J.S. 30a) On December 13, 1995, the court issued its order adopting a remedial reapportionment plan to be used in the 1996 elections. (U.S. J.S. 1a) Both the United States and the *Abrams* intervenors filed notices of appeal. On February 6, 1996, this Court denied the *Abrams* intervenors' motion for a stay, and the same motion was again denied by this Court on June 7, 1996. Probable jurisdiction was noted on May 20, 1996.

B. Statement of Facts.

The 1994 Trial of the Eleventh Congressional District and the District Court's Findings. According to the 1990 census, Georgia was entitled to an increase in its number of representatives from ten to eleven. Legislative committees in both the Georgia House and Senate began the reapportionment process early in 1991 by adopting guidelines for new redistricting plan. (Jt. Exs. 9, 10) These guidelines required, among other things, that no plan considered or adopted should be permitted to "dilute minority voting strength." *Id.* From the outset, the views and the dictates of the Department of Justice played a decisive role.

The reapportionment process is well documented in the district court's 1994 opinion. Some of the pertinent findings include the following:

One of the "third party" redistricting proposals submitted to the legislature in 1991 would later earn the ominous moniker, "the max-black plan." That plan, created by Ms. Kathleen Wilde, then an attorney with the American Civil Liberties Union ("ACLU") and in her capacity as advocate for the Black Caucus of the Georgia General Assembly, provided for three "majority-minority" congressional districts in Georgia: the Second, Fifth and Eleventh. . . . In contrast, the then existing congressional plan had only one majority-minority district: the Fifth. *Johnson v. Miller*, 864 F. Supp. 1354, 1360-61 (S.D.Ga. 1994).

. . . .

The Court realizes that the motivations of the State of Georgia are the legally relevant motivations in this case, and not those of the ACLU or the DOJ. We consider the behavior of the latter parties, however, because it is inextricably linked to the redistricting decisions of the General Assembly. The actions of the legislature have much less significance when removed from their context. *Id.* at 1361-62.

. . . .

It is unclear whether DOJ's maximization policy was driven more by Ms. Wilde's advocacy or DOJ's own misguided reading of the Voting Rights Act. This much, however, is clear; the close working relationship between Ms. Wilde and the Voting Section, the repetition of Ms. Wilde's ideas in Mr. Dunne's objection letters, and the slow convergence of size and shape between the max-black plan and the plan DOJ finally precleared, bespeak a direct link between the max-black plan formulated by the ACLU

> and the preclearance requirements imposed by DOJ.
>
> Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment. *Id.* at 1368.
>
> . . . .
>
> The amount of evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the parties involved. *Id.* at 1374.
>
> . . . .
>
> Any attempt to explain the Eleventh District as anything but a far-flung search for black voters utterly collapses under the weight of direct evidence. One need only review DOJ's objection letters and our findings of fact to see that DOJ spent months demanding purely race-based revisions to Georgia's redistricting plans, and that Georgia spent months attempting to comply. The testimony at trial reflects this sorry process, and it is compelling. *Id.* at 1377.

The district court reviewed evidence concerning racial voting patterns, "racially polarized voting," and the like. It concluded in this regard:

> All that is clear from the evidence is that some degree of vote polarization exists, but not in alarming quantities. Exact levels are unknowable. . . .
>
> In addition, we also find a significant degree of crossover voting in Georgia and the Eleventh District, with white voters slightly more willing to vote for black candidates than

> black voters for white candidates. Rpt. of Dr. Katz, Table 2. The average percentage of whites voting for black candidates ranged from 22% to 38%; the average percentage of blacks voting for white candidates ranged from 20%-23%. Black and black-preferred candidates in Georgia have achieved many electoral victories in local and state-wide elections and have received significant – occasionally overwhelming – support from both black and white voters within the Eleventh Congressional District. . . . [T]he very lack of solid evidence of black vote cohesion or rampant bloc voting, i.e., vote polarization, contributes to our conclusion that the current Eleventh District was not an appropriate section 2 remedy. *Id.* at 1390-91.

Based on all the evidence, the court made the following conclusions of law:

> In sum, the current districting plan is not reasonably necessary to comply with sections 2 or 5 of the VRA. Since no compelling state interest other than VRA compliance is evident, the plan fails strict scrutiny under the Fourteenth Amendment. We finally conclude and declare that Georgia's Eleventh Congressional District is unconstitutional in its current composition. The State of Georgia is hereby barred from using it in future congressional elections. *Id.* at 1393.

All of the district court's essential findings were affirmed by this Court in *Miller v. Johnson I*. Finding that strict scrutiny was not satisfied, this Court agreed that the plan was unconstitutional.

The Evidence and Findings Concerning the Second Congressional District. Georgia's second congressional district

suffered the same ACLU-DOJ dictated origins as did the eleventh district struck down in *Miller I*. In its order of December 1, 1995, the trial court accordingly found that the second district was also unconstitutional, a finding unopposed by the Department of Justice.[1] (U.S. J.S. 30a-38a) The Court found as follows:

> After a trial on the merits and in the light of *Miller v. Johnson*, 115 S.Ct. 2475 (1995), we find and conclude, that race, namely, the intention to create a congressional district in which black persons would be a majority of the voting age population, was the overriding and predominant factor motivating the placement of the Second District's boundaries. We find that the boundary line for the district was consistently drawn to keep potential black voters in the district and to keep potential white voters out of the district. The district was drawn to segregate voters according to their race; so, it is an unlawful district.
>
> Twelve of the Second Congressional District's thirty-five counties were split, and to draw the Second Congressional District as it is now also required the splitting of twenty-eight precincts. In addition, the boundary of the Second District splits the cities of Columbus, Macon, Albany, Manchester, Roberta, Byron, Centerville, Warner Robins, Ft. Valley, Perry, Cordele, Leesburg, Moultrie, and Valdosta.

---

[1] None of the private intervenor-defendants lived in the second district, and they thus lacked standing to participate in the district court's determination of that issue under *Hays v. Louisiana*, 132 L.Ed.2d 635 (1995).

> Before 1992, the second district included no portions of the city of Columbus or portions of the City of Macon. Before 1992, the Second Congressional District contained no split counties.
>
> We find that the sole reason for splitting precincts was racial and that the predominant reason for splitting the counties and cities was racial as well. . . .
>
> Linda Meggers, Director of Reapportionment Services for the Georgia General Assembly, was qualified as an expert witness. She testified that it was not feasible to create a majority-minority district in the Second Congressional District without including the black population centers in Columbus and Muscogee County, Albany and Dougherty County, and Macon and Bibb County. She further testified that, in drawing the Second Congressional District, she – we find her to have been the chief draftsperson for the District – followed the "Max-Black Plan," as espoused by the ACLU, to the same degree to which she followed it in drawing the Eleventh Congressional District. The Max-Black Plan's purpose was to maximize black voting strength in certain congressional districts by making the racial composition of those districts the overriding consideration in their design. (U.S. J.S. 33a-35a)

In conclusion, the trial court held that, while the second district differed in some respects from the eleventh, those differences were "not significant enough to make the second district constitutional." (U.S. J.S. 36a)

> Nothing in the State's argument changes the fact that the General Assembly was predominantly motivated by race in its drawing of the

> Second Congressional District. The sections of the district's boundary that were drawn for racial reasons are substantial in terms of both distance and population affected. . . .
>
> Because race was the overriding and predominant motivating factor in designing the Second Congressional District, the district can be upheld only if it survives strict scrutiny. (U.S. J.S. 37a)

The trial court found no compelling justification for the race-based districting of the second district, just as it, and this Court, had found with the eleventh district. *Id.* at 37a-38a.

The Relief Ordered by the District Court. The State's existing plan was not unconstitutional in just one or two small respects. It suffered major distortions because of the DOJ's illegal actions. Furthermore, because the second district was located in south-west Georgia and the eleventh district was located in east-central Georgia, the district court was required to fashion a remedy to an existing plan that involved unconstitutional district lines located literally across the entire State.

At the remedy hearing, Ms. Linda Meggers (the director of the State's Reapportionment Office whose testimony has been cited both by the district court and this Court earlier) testified about the origins of any impetus to draw a plan with two majority black districts. She testified that, whether it be two majority black districts or three, the perception by the State that that should be done

originated from the expressed demands of the Department of Justice. (Tr. 430-33)[2] Ms. Meggers further testified that – unless race was the predominant motive that trumped other considerations – a second majority/minority district could not be drawn.

> Q: Consistent with your understanding of the decision in *Miller v. Johnson* and the Voting Rights Act, a second minority/majority district was not, at least in your opinion, possible?
>
> A: Not one that says 50 percent on the [VAP] in 1990, no, sir, it was not. (Tr. 434-35)

To the extent that the State had at one time been motivated to draw two – and even three – majority-minority districts, there was other uncontradicted evidence that that was the product of the perceived need to do so in order to satisfy the DOJ's demands. In addition to the 1994 evidence and the findings of the district court, two additional legislators testified on this issue at the 1995 hearing. One of them, Robert Hanner, was the Chairman of the House Reapportionment Committee. He described a meeting that he and other Georgia representatives had prior to the initial reapportionment where John Dunne spoke. At the time, Dunne was the senior-most DOJ attorney for civil rights:

> Q: Can you tell us what you recall about that meeting?
>
> A: From the seminar or the meeting in Baltimore we came away thinking we had to

---

[2] All "Tr." cites in this brief are to the October 30-31, 1995, hearing.

have a second majority black district in Georgia.

Q: Was the standard, if it was technically possible?

A: Yes, we had to have one. (Tr. 74-75)

The *Abrams* intervenors' plans – i.e., the ACLU plans – were introduced at the remedy hearing through the testimony of Selwyn Carter, an employee of the Southern Regional Council, whose job was to draw and advocate reapportionment plans "across the South." (Tr. 294) Mr. Carter was candid regarding the role of race in his work:

> My basic goal in preparing [Georgia congressional] plans was to try to show it is possible to develop a constitutional redistricting plan which is fair to both black and white voters in the State of Georgia and comply with this Court's ruling in *Miller v. Johnson*. *To show that it is possible to draw a plan in which African-American voters comprise approximately 50 percent of the voting age population of a district and at the same time show that race was not a factor.* (Tr. 296) (emphasis added)

Furthermore, Mr. Carter acknowledged that *his effort was designed to make as few changes in the unconstitutional second and eleventh congressional districts as he could.* (Tr. 298) While testifying on direct that, in his own opinion, he had not used race as a "predominant" factor in drawing the ACLU's districts, he further acknowledged his operating view that majority-minority districts *had* to be drawn where they could be:

> I do believe as a result of *Thornburg v. Gingles*, the State has an obligation to draw a district that

> is fair to minority voters if the geographical distribution of voters is such that such a district can be drawn. (Tr. 325)

Mr. Carter could not say that the Voting Rights Act required the kind of majority-minority districts that he had drawn and that were advocated by the *Abrams* intervenors: (Tr. 324-27, 330)

> Q: . . . [T]here isn't a single plan, ACLU, black caucus or your organization, that you can say under oath is required by the Voting Rights Act in terms of the second minority-majority district?
>
> A: I believe that we are in a gray area of the law. It used to be clear a couple of years ago, and it is not as clear now as it used to be.
>
> . . . .
>
> Q: But you would agree that there could still be clear cases wherein a minority district would be required by the Voting Rights Act?
>
> A: I believe that's true. (Tr. 332-33)

Mr. Carter's intentional inclusion of a second majority black district in his plans for Georgia was admittedly a political response to his client, the Georgia legislative black caucus.

> Q: Mr. Carter, you told any number of people during [the 1995 Special Session] that to be politically acceptable to the black caucus, there had to be a second Congressional district that was majority black?
>
> A: Yes, sir.

Q: With regard to whether it was required by the Voting Rights Act or not, for the black caucus to support any plan, it had to include a second majority black district?

A: I do not recall making any reference to the Voting Rights Act.

Q: But in your own mind, that was the reality?

A: Yes. In the advice and assistance that I provided to the black caucus, all the plans which I either drew or which I recommended that the black caucus support contained two minority-majority congressional districts. (Tr. 330-31)

Based on the wealth of evidence before the district court from the 1994 trial and the 1995 proceedings, the court proceeded to craft its own plan, the basis of which is described in a painstaking, thirty-three page decision. Because of the pervasive unconstitutionality that infected the existing redistricting plan in this case, the court concluded that that plan did not provide the kind of remedial guidance found in a typical one-person/one-vote case:

> At first glance it appears that, in remedying Georgia's constitutionally infirm congressional districting plan, we are faced with the same task as the *Upham* court, which would entail making only those changes necessary to bring the current plan into constitutional compliance. However, this Court's remedial task differs from that of the *Upham* court's because Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by unconstitutional DOJ interference. *See Johnson I*, 864 F. Supp. at

> 1367-68. By virtue of its unconstitutional origin, Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent. (U.S. J.S. 4a)
>
> . . . .
>
> Using the current plan as a basis for the remedy would, in effect, validate the DOJ's constitutionally objectionable actions. Thus, we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals. (U.S. J.S. 5a)

The court acknowledged its duty to adhere to one-person/one-vote requirements, and to then ascertain, to the extent that it could, the traditional districting considerations evidenced by the Georgia General Assembly. (U.S. J.S. 7a-8a) There was abundant evidence that Georgia had a strong historical interest in maintaining its political subdivisions intact. (U.S. J.S. 8a-10a) In fact, during the State's entire two hundred year history, whole counties have always been the basis of its government organization.

> Georgia's strong historical preference for not splitting counties outside of the metropolitan Atlanta area, as well as other unique factors, account for some of our plan's deviation. . . .
>
> Georgia has preferred to split counties only in the Atlanta area where division was necessary because of Atlanta's dense population relative to other areas of the state. . . . The product of the Court's efforts is a lower overall deviation than Georgia's 1982 and 1992 plans.

> However, maintaining political subdivisions (counties) cannot alone justify less than perfect deviation in a court plan. . . . We therefore considered splitting counties outside of the Atlanta area, but other factors unique to Georgia militated against it. (U.S. J.S. 8a-10a) (footnotes and citations omitted)

The court went on to discuss other historical redistricting criteria in Georgia, and the court explained how it decided where to locate Georgia's new eleventh district:

> We drew upon Georgia's 1972 plan and 1982 plan, as well as the first plan enacted in 1992, to determine how the legislature typically maintains district cores from one plan to another. Our first hurdle was where to locate the new Eleventh District. Since significant population growth is occurring in the Atlanta area, it follows that the new district would be created where future growth is anticipated. Carving the new district where growth is projected allowed us to include fewer counties within the district, consequently enabling us to better maintain district cores.
>
> We placed the new Eleventh District in the Northeast Atlanta corridor out to the northeast Georgia state line. The Eleventh District now contains counties which are becoming more urban with the population growth, notably Walton County and Newton County. . . . The Eleventh also contains the Athens-Clarke County area which has become a metropolitan area in its own right, and locating it in the Eleventh is consistent with the new Eleventh's urban/suburban flavor. *Id.* at 12a-14a. (U.S. J.S. 12a-14a)

Georgia's past congressional redistricting plans reflected what the witnesses described as the four "corner" districts. The court found this to be a meaningful factor:

> The four "corner" districts include: 1) the southeastern coastal district, comprising the coastal counties and the other counties most closely related to them; 2) an agrarian district in southwest Georgia, prominent for its peanut production; 3) the northwestern corner, known for its carpet production and isolated from the northeast Georgia counties by mountains; and 4) the northeastern corner, identified by its preeminent position in poultry production. Maintaining these districts is consistent with the community of interest factor approved by the Supreme Court. (U.S. J.S. 16a-17a)

To the extent possible, the court also sought to follow the General Assembly's historic continuation of "district cores" from one plan to another.

> The 1972, 1982, and the three 1992 plans that passed the legislature evidence this legislative preference. Our remedy bears a striking resemblance to these earlier plans, especially in the rural districts such as the First, Second, Eighth, and Ninth. (U.S. J.S. 17a-18a)

Finally, the court discussed its continuation of the urban district in the Atlanta area, which was majority black, and which had existed since 1972. Race was considered by the court as a factor insofar as it determined that "the legislature would have considered it in maintaining [this] one majority-minority district." (U.S. J.S. 17a) The court also noted some lesser interests, and

accorded them appropriately lesser weight. For example, there was some history in Georgia of drawing district lines so that incumbents would not be pitted against one another under a new plan. "The court considered this factor, but since it is inherently more political than factors such as communities of interest and compactness, we subordinated it to the other considerations." (U.S. J.S. 18a)

SUMMARY OF ARGUMENT

Compliance with Upham v. Seamon. The court acted well within its discretion in adopting the plan that it did. The court fashioned a remedy that reflected Georgia's historical districting considerations to the extent possible, consistent with all constitutional requirements. While appellants contend that the remedy should have more closely resembled the 1992 plan, they ignore the fact that that plan was unconstitutional both in its overall purpose and in its detailed design. The 1992 plan was essentially the illegal "black max" plan that was forced upon the State by the appellants during the Section 5 process in 1991-1992.

Section 2. The district court correctly found that Section 2 did not mandate the creation of another black majority district. To have drawn such a district would have required that race predominate over traditional, nonracial districting considerations. Moreover, the record in this case contains nowhere near the kind and quality of evidence that would be necessary to show that Section 2

was violated by having a single black majority district in Georgia's plan.

Population Equality. Appellants should be foreclosed from advancing their claim of a one-person/one-vote violation in this Court because it is contrary to the position they advocated below. Furthermore, the minor deviation here was fully justified by the district court's efforts to accommodate legitimate, non-discriminatory districting considerations like preserving traditional district cores and maintaining political subdivisions intact.

Section 5 and Retrogression. By its terms, Section 5 has no bearing in this case. Appellants acknowledge that that statute does not apply to a court-ordered plan. The appellants' argument that the statute's substantive restrictions should nevertheless be imposed on the district court is an argument without precedent. It is little more than an effort to try to preserve as much of the illegal plan that appellants forced upon the State during the original reapportionment process.

ARGUMENT

I. THE DISTRICT COURT NEITHER ABUSED ITS DISCRETION NOR DEVIATED FROM THE CONSTRAINTS OF *UPHAM V. SEAMON* IN ADOPTING THE REDISTRICTING PLAN HERE.

A. It Was The Duty Of The District Court In This Case To Impose A Remedy That Eliminated Entirely The Unconstitutional Gerrymander That Was Georgia's 1992 Congressional Districting Plan.

For a half century now – since the initial remedy decision in *Brown v. Board of Education*, 349 U.S. 294 (1955) – this Court has made clear the equitable duty of a district court when devising a remedy for a violation of the Fourteenth Amendment. That duty is to devise a remedial plan that completely eliminates all vestiges of the government's unconstitutional action. As this Court unanimously described this burden in *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-38 (1968), the defendant has "the affirmative duty to take whatever steps might be necessary to convert to a [nondiscriminatory] system in which racial discrimination would be eliminated root and branch." When the defendants are either unwilling or unable to voluntarily adopt a plan that satisfies this burden, it is then the duty of the district courts to impose such a remedy. *Green v. County School Board of New Kent County, supra; Swann v. Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 15 (1971):

> If [the defendants] fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's

> equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in inequitable remedies.
>
> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Swann, supra* at 15 (citations omitted).

This basic remedial principle remains unchanged. As the Court recently held in *Freeman v. Pitts*, 503 U.S. 467 (1992):

> The objective of *Brown I* was made more specific by our holding in *Green* that the duty of a former *de jure* district is to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 486 (citation omitted).

The broad constitutional duties here are no different. The obligation of the district court to impose a complete remedy is the same in this case as in *Freeman, Swann,* and this Court's other constitutional decisions. Pervasive violations of the equal protection clause having been found to infect Georgia's statutory congressional reapportionment plan, the district court was bound to impose a remedy that fully, completely and totally eradicated the racial gerrymander of the old plan, "root and branch."

B. Particularly In Light Of The Pervasive Consequences Of The Constitutional Violations Here, The District Court Fully Complied With The Equitable Requirements Of *Upham v. Seamon.*

Appellants complain that the extent of change reflected by the district court's remedy, when the new plan is compared to the original plan, exceeds the limits permitted a court in equity. But in advancing this argument, appellants point to no finding of the district court that might have been clearly erroneous. Rather, they simply proceed on the assumption that any plan that contains significant changes from the old plan – the *unconstitutional* old plan – must automatically fail to be a "minimum change" plan and must therefore violate the constraints of *Upham v. Seamon*, 456 U.S. 37 (1982), *White v. Weiser*, 412 U.S. 783 (1973), and other such cases. Appellants' assumption is misplaced.

The eleventh congressional district contained parts of three major urban counties: Chatham, Richmond and DeKalb. The great bulk of the population of the district came from these three counties. Each was split along the kind of racial lines that this Court found unconstitutional. Because race was proved to be the overall driving force in the eleventh congressional district – dictating its broad architecture as well as individual county splits – and because the three major population areas in the district had been split on the basis of race, any remedial plan that eliminated these constitutional violations necessarily looks different than the old plan. This the appellants ignore.

Moreover, while the remedy necessitated by the eleventh district alone would be extensive, the district court also had to address the unconstitutional second district. Any remedy for the second district, too, necessitated significant changes in Georgia's congressional plan. Twelve separate counties in the second district were split, all on the basis of race. These race-based splits involved every significant city in the second district. The boundary of the district weaved in and out of counties in order to pick up even minor black populations in small towns, all to increase the black percentage in the district. (U.S. J.S. 33a-35a)

The court's remedial plan necessarily differed in appearance from what had been forced upon the State of Georgia by the ACLU and the Department of Justice during the Section 5 process in 1991 and 1992. Had the court followed the path advocated by appellants, and adopted a plan patterned on the existing, unconstitutional plan – one that simply "ironed out" the most egregious contortions – the court would have been continuing the fundamental constitutional violations that were found here.

Indeed, when one considers that *every major population center in Georgia* had been split on the basis of race by the ACLU/DOJ dictated plan, it should be obvious that any effort to remedy that race-based districting would have to look very different than the old plan. With the bulk of the State's population involved in racial gerrymandering, the elimination of that gerrymandering inevitably necessitated a significant redrawing of the lines.

The *Upham* rule does not fit the circumstances of this case as it did the original Texas litigation where the case arose. That is true because the plan adopted by the Georgia General Assembly in 1992, did not express the policy choices of the State. In *Upham*, there was nothing wrong with the plan as a whole. There had simply been a Section 5 objection to a small feature of the plan. Where the district court erred in *Upham* was to redraw great parts of the plan that were unaffected by the Section 5 objection.

Here, the case is entirely different. The legislative plan was dictated largely by the DOJ's Section 5 unit. Therefore:

> Using the current plan as the basis for the remedy would, in effect, validate the DOJ's constitutionally objectionable actions. Thus, we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals. (U.S. J.S. 5a)

Appellants do not challenge this finding as clearly erroneous, nor could they based on the record in this case. That should be dispositive of their appeal on this issue.

C. The District Court Made Every Possible Effort To Discern Georgia's Non-discriminatory Districting Interests And To Fashion Them Into A Remedy Consistent With Federal Requirements.

Appellants' complaint that the district court ignored Georgia's traditional districting principles, thus violating *Upham* and *Weiser*, also disregards what the district court actually did in this case. The State's traditional districting principles were reviewed by the trial court in detail.

These principles were then followed to the extent possible in fashioning the remedy. (U.S. J.S. 12a-18a)

In discerning these historical redistricting considerations, the court "drew upon Georgia's 1972 plan and 1982 plan, as well as the first plan enacted in 1992, to determine how the legislature typically maintains district cores from one plan to another." (U.S. J.S. 13a) Utilizing the traditional district cores, the court then carved out the new eleventh district that Georgia received because of its population increase. Because of "significant population growth" in the Atlanta area, the eleventh district was started there. This growth allowed the court "to include fewer counties within the district, consequently enabling us to maintain district cores." (U.S. J.S. 13a) The eleventh district also traversed counties outside of Atlanta "which are becoming more urban with the population growth," and it also "contains the Athens-Clarke County area which has become a metropolitan area in its own right, and locating it in the Eleventh is consistent with the new Eleventh's urban/suburban flavor." *Id.* Appellants do not take issue with a single one of the facts found by the court in its drawing of this district as being based on historical Georgia districting principles.

Furthermore, the court put a great deal of emphasis on maintaining political subdivisions intact, and Georgia's counties in particular. It did so because of "Georgia's strong historical preference for not splitting counties outside of the metropolitan Atlanta area." *Id.* at 8a. Appellants belittle the court's effort to maintain the integrity of Georgia's cities and counties. For example, the DOJ points out that, for a few years under one

congressional plan in the 1970s, one non-Atlanta County (Whitfield County) out of Georgia's 159 counties was split between two congressional districts. (U.S. Brief, p.18) But again, appellants make no challenge to the court's finding as clearly erroneous.

Moreover, one cannot look at the facts without coming to the same conclusion that the district court did. Since Georgia was first a State, its government has been organized on the basis of counties. As long ago as the Constitutions of 1777, 1789, and 1798, for example, the legislature was invariably elected by the electors in these units of local government. *See generally*, W. McElreath, A TREATISE ON THE CONSTITUTION OF GEORGIA: HISTORY, DOCUMENTS, AND CONSTRUCTION (1912). Georgia's apportionments – both for Congress and for its own House and Senate – continued to be based exclusively on compact and contiguous groupings of intact counties until a county split was first required to comply with *Baker v. Carr*, 369 U.S. 186 (1962). Even then, the absolute minimum county splitting occurred, that being limited (with one temporary exception) to county splits that had to be made in the Atlanta area because Fulton County's population exceeded the population of a single congressional district. (U.S. J.S. 8a-10a, 15a-16a)

In maintaining Georgia's counties intact, in trying to maintain the traditional cores, in continuing Georgia's historic districts in the "four corners" of the State, and otherwise, the district court made every reasonable effort to put itself in the place of what the General Assembly would have done in 1991-92 *had it not been for the illegal excesses of the DOJ*. Appellants are unable to show how the district court might have abused its discretion in this

regard or been clearly erroneous in any fact that it relied upon.

Appellants' real complaint is a philosophical difference with this court's *Miller v. Johnson I* decision. They contend that anything is an abuse of discretion that does not preserve as many majority-minority districts as possible. They are arguing "black max" once again, reined in from three districts to two only by virtue of this Court's first decision. Their contentions are not based on the equitable rules that govern a court's development of a redistricting remedy.

D. No Alternative Plan Was Offered By The Intervenors That Was A Good Faith Effort To Remedy The Constitutional Defects That Existed.

Appellants correctly state that they offered "remedial plans" to the district court that would have changed the old plan less than did the court's ultimate remedy. But appellants completely failed to show that their plans would have remedied the constitutional defects found by the district court and this Court. To the contrary, the remedial plans offered by appellants (and the incumbent congressional representatives, acting as amici), reflect much of the same architecture and line drawing difficulties that led to the declarations of unconstitutionality.

The *Abrams* intervenors' plans were introduced exclusively on the testimony of Selwyn Carter. His own testimony makes clear that his efforts were not directed at remedying the constitutional violations found in this case. To the contrary, he had two admitted objectives. The first was to draw a plan with two majority black districts.

"[A]ll the plans which I either drew or which I recommended that the black caucus support contained two minority-majority congressional districts." (Tr. 330-31) His "basic goal" in preparing these plans was to show "it is possible" to create a plan with such districts "in which African-American voters comprise approximately 50% of the voting age population." (Tr. 296) Secondly, Mr. Carter admitted that he tried to maintain the "districts with as little change as possible," making only those changes that he believed would correct the constitutional defects. (Tr. 298)

These admissions by Mr. Carter – as well as what is plainly apparent from merely looking at the ACLU's remedial plans – is fatal to their appeal. By their own admission, the *Abrams* intervenors did not advocate a remedy that either (1) sought to adhere to Georgia's traditional district considerations, or (2) sought to do what the General Assembly would have done in 1991-92 in the absence of the illegal actions of the DOJ. Instead, the *Abrams* intervenors' entire strategy is simply to try to hold on to as much of the illegal plan as they can, the plan that they successfully forced upon the legislature initially.

The Department of Justice relies on its so-called "Illustrative Plan." This plan should not even be considered by this Court on appeal. The DOJ stood mute when the trial court – on two separate occasions – solicited remedial proposals from the parties. (See Orders of October 17 & 20, 1995) At the remedy hearing itself on October 30-31, 1995, the DOJ once again declined to submit a plan.

It was not until November 22, 1995 – after the evidence was closed – that the DOJ ever submitted its "Illustrative Plan". This exhibit was filed under the pretense of being a "response" to another plan.[3] (R. Vol. 12, 369) It would appear – just as with the *Abrams* ACLU plans – that the DOJ's belated plan was simply an effort to preserve as much of the old, unconstitutional plan as it could. Two majority black districts are the *sine qua non* of the DOJ's plan. Was racial segregation of the voters 50% of the motivation behind that plan? 75%? or 90%? One cannot say for sure because the DOJ's late-submission tactic was designed to insulate its demographer from cross-examination.

The United States should not be allowed to use such tactics to immunize its submissions from the same kind of searching examination given to the other parties' proposals. Even without such an examination, though, the DOJ's purposes seem apparent. As the district court noted, the DOJ's "plan split numerous counties outside of

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[3] After the hearing, the court issued an order directing plaintiffs' counsel to submit an additional map that was to be identical to one of plaintiffs' earlier plans, but with even smaller population deviations. (Order of November 9, 1995) The plaintiffs did that, and the DOJ then used that submission as an excuse to file its "Illustrative Plan," though the DOJ plan had nothing to do with the court's order or the slight revisions to the plaintiffs' remedy. Rather, it was an obvious effort to place into the record the kind of plan that the DOJ had earlier disavowed any intention of submitting or advocating, and which should have been submitted – if at all – at the remedy hearing. The State defendants promptly objected to the DOJ's action. (R.Vol. 12, 374)

the metropolitan Atlanta area, apparently for racial reasons." (U.S. J.S. 8a, n.4)

II. THE REMEDIAL PLANS ADVOCATED BY APPELLANTS ARE NOT MANDATED BY SECTION 2 OR "VOTE DILUTION" PRINCIPLES.

A. The Record Is Devoid Of The Kind Of Evidence Necessary To Show A Section 2 Violation In This Case.

To say that the appellants' evidence of a possible Section 2 violation was skimpy is charitable. Given that they would have to show that the district court was clearly erroneous, their failure of evidence is fatal. In essence, they simply rely upon (1) the district court's judicial notice of Georgia's past history of segregation, and (2) some cobbled-together testimony concerning "racially polarized voting," which was substantially contradicted by other witnesses and rejected by the district court. Before a federal court might condemn a State's entire reapportionment plan as illegal under federal law, much more would surely be required.

Appellants pay no more than lip service to the statutory language that the "totality of the circumstances" be examined to ascertain whether federal law overrides State electoral choices. Appellants could not seriously suggest that their evidence touched upon the "totality" of the political process in the State of Georgia as it affects black voters. Politics – and race relations – are indisputably vastly more complex than the appellants would suggest.

Moreover, appellants lose sight of the fact that the nature of their Section 2 claim affects the weight of the evidence necessary to prevail. It is one thing to challenge at-large or multi-member district schemes as dilutive of minority voting. Assessing the at-large feature for its racial impact – and eliminating that feature from the electoral scheme if appropriate – is a much simpler and more direct task than assessing the relative impact of comparative single-member district schemes. This Court recognized the difference between such claims in *Johnson v. DeGrandy*, 129 L.Ed.2d 775, 788-89 (1994). While this Court has not yet articulated just what quantum of proof is necessary to satisfy the "totality of circumstances" burden in a single-member district case, it is telling that the Court has *never* yet found the evidence sufficient in any case where that claim has been advanced.

However heavy a challengers' burden should be, far more need be shown than appellants adduced here. Otherwise, the DOJ and the ACLU were right in their original "black-max" argument: With a minimal evidentiary showing, a State would be required to draw as many majority-minority districts as it can.[4]

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[4] The DOJ is explicit in making this argument. They claim that a significant piece of "evidence" in showing the totality of the circumstances here is that the district court's plan has only one black majority district out of eleven. (DOJ Brief, p. 21) It is difficult to imagine a more circular argument.

B. The Evidence Concerning Racial Voting Patterns In Georgia Is Fatal To Appellants' Claim.

Appellants argue in this Court that "racially polarized voting" is so severe that black candidates cannot win. *In so arguing, they ignore the contrary findings of the district court from the first trial.* Those findings, of course, are binding on the present proceeding. They were findings essential to the first judgment, and that judgment was affirmed on appeal. No new evidence, since remand from this Court's decision, was introduced by appellants on this issue.

In addition, in relying on Dr. Lichtman's testimony as if it were an accepted fact, appellants ignore that his testimony was substantially contradicted. Dr. Joseph Katz evaluated Dr. Lichtman's data, and he found the inherent uncertainty in it enormous. To a reasonable level of statistical certainty, Dr. Lichtman's techniques showed almost nothing.[5]

The DOJ goes on to assert electoral "facts" that were proved by no evidence, and directly contradicted by substantial evidence. Using hypothetical "crossover voting" percentages, they conclude that a black candidate "would

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[5] For example, instead of the precise correlations that Dr. Lichtman presented to the court, the data actually suggested huge ranges, many of them showing an impossible "minus" correlation. (See, e.g., Jt. App. 38-52) Wherever the "impossible" appeared in his calculations, Dr. Lichtman arbitrarily chose to characterize that data as having *absolute* racially polarized voting – i.e., no racial crossover. In fact, as Dr. Katz' testimony demonstrated, those figures illustrated no such thing, but rather the inherent unreliability of his techniques. See State Ex. 170.

likely be foreclosed from winning election in the court's Tenth District." (DOJ Brief, p. 27) This statement purports to be based on (1) the fact that that district has a black VAP of 34%, and (2) assuming crossover voting percentages similar to what the court found existed. What the DOJ fails to disclose is that those crossover percentages do not apply in each and every race. They are just an average, and they go up and down from one election to another. To insinuate that they are a static, inflexible rule, and that a black cannot win, is a serious distortion of the evidence.

In fact, appellants put up no evidence concerning the probability of black-preferred candidates winning. Only the State's expert, Dr. Katz, even addressed the likelihood of winning or losing, and it was his testimony that the district court necessarily relied upon for this point. (State Ex. 170, pp. 21-22 & Tab 5)[6] According to Dr. Katz, the probability of a black candidate winning in a black-white election in a district with 34% black registered voters would be substantial – nothing like the "impossibility" the DOJ misrepresents to this Court. *Id.*

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[6] The charts showing these probabilities were not included in the Joint Appendix prepared by appellants, although requested. Several of them are therefore reproduced in App. A hereto.

C. Unless Section 2 Were To Be Construed To Mandate "Proportional Districting," The District Court Correctly Concluded That A Second Majority Black District Was Not Required Here.

The trial court held that a second black district could not be constitutionally drawn here without violating the gerrymander prohibition of *Miller I* and *Shaw I*. According to the court, only if race were allowed to predominate over the traditional districting consideration of maintaining counties intact, could such a district be created because of the dispersion of minority population around the State. (U.S. J.S. 20a-24a)

While not quite claiming that that finding is clearly erroneous, appellants point to their various proposed plans to contend that an appropriate second black majority district could be drawn. But what appellants ignore is that, while such a district is technically feasible, race continues to play a heavy, predominant role in their favored plans. The *Abrams* intervenors' plans – those drawn by Selwyn Carter – were clearly predicated largely on the basis of race. They were, moreover, drawn for the express purpose of continuing the old, unconstitutional plan to the greatest extent possible. They were not appropriate remedies, and, as the court noted, they intentionally cracked counties on the basis of race to achieve their purpose. That would appear to be the same kind of trumping of historical considerations for purely racial reasons that is criticized in *Miller I*.

As to the DOJ's "Illustrative Plan," it splits both Muscogee and Bibb Counties and does so on the basis of race. The DOJ has the temerity to tell this Court that its

plan comports with "the State's traditional districting practices," and that it is not "predominantly" based on race. (DOJ Brief, pp. 15-25) This contention is extraordinary given that the DOJ submitted its plan out-of-time in order to shield the plan and its purposes from cross-examination by the parties and scrutiny by the court. Why, for example, were certain counties included in particular districts? Was it for racial reasons entirely or substantially? Were the county splits based predominantly – or entirely – on race? Given the DOJ's unabashed philosophy here – that the maximum number of black districts should be imposed by any means possible – the certain outcome of such an inquiry, had cross-examination been allowed, is apparent. That the Solicitor General would now describe in his brief the supposed purposes of this plan – and to act as if race was not a very real, driving purpose – is remarkable given the tactical ploy the DOJ used to get this plan in the record without disclosing its true purposes.

D. The Court Afforded All Parties Adequate Opportunities To Introduce Section 2 Evidence.

The *Abrams* appellants incorrectly argue that they were not allowed a hearing on their dilution claim. (*Abrams* Brief, p. 44) In fact, the court allowed all parties – including the intervenor-appellants – a full hearing on the issue of remedy. That hearing took place October 30-31, 1995. There were no restrictions placed on the

evidence or arguments one could offer at that time.[7] If intervenors claimed that Section 2 vote dilution principles demanded that a certain kind of reapportionment plan be adopted, their opportunity to present evidence to that effect was at that time (as well as at the merits trial itself). Their failure to present such evidence is their failure, not the court's "refusal" to hear them. As the court's order expressly notes, appellants advanced Section 2 claims at the remedy hearing. They were simply rejected, based on the evidence.

> During the remedy phase of the hearing, a significant portion of the argument centered on whether the Court's remedy would be required by Section 2 to contain two majority-minority districts. We have considered Section 2 and the case law construing it, and we conclude that two majority-minority districts are not required by Section 2 because including two such districts would violate *Johnson II*'s principles. (U.S. J.S. 19a)

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[7] The only exception is that one witness was excluded when offered on behalf of certain amici who had been invited to participate because that witness had not been identified previously. In fact, he was substituted at the last minute for another witness who had been impeached during his pre-hearing deposition.

III. THE COURT'S PLAN MADE THE REQUIRED GOOD FAITH EFFORT TO ATTAIN POPULATION EQUALITY AMONG THE DISTRICTS, AND THE SLIGHT DEVIATION THAT RESULTED IS WITHIN CONSTITUTIONAL LIMITS.

A. The Population Deviations In The District Court's Plan Are Nearly Zero, And They Are Much Less Than The Present Day Difference That Result From The Population Changes That Have Occurred Around The State Since The 1990 Census.

The population deviation among the districts is *de minimis*. The plan "has an overall population deviation of .35%, and an average deviation of .11%." (U.S. J.S. 6a) Appellants assert that another plan with a lower overall deviation (0.19%) was offered by the Department of Justice, and the *Abrams* appellants contend that "given modern computer technology, there is no reason why there should be any deviation in a court ordered congressional redistricting plan." (*Abrams* Brief, p. 49) Appellants' assertions ignore the facts of the case, the law, and common sense.

The district court explicitly found that no other plan presented to it – *thai was constitutional* – had a lower deviation. That finding included, of course, the "Illustrative Plan" offered by the Department of Justice, which sought to perpetuate the existing unconstitutional districts. (U.S. J.S. 7a-8a)

Indeed, common sense should preclude the appellants' argument on this point. We are now closer to the census for the year 2000 than we are to the 1990 census.

Without doubt, there have been substantial population changes over the past six years throughout Georgia, which is one of the fastest growing states in the country. Even exact mathematical precision in a reapportionment plan based on the 1990 census necessarily must have significant current deviations *today*, in some cases surely surpassing ten or twenty percent. Under these circumstances, in between censuses as we are, it would be absurd to criticize a district court's plan that had a total population deviation of .35% because "modern computer technology" could reduce the number further. Modern computer technology cannot, in fact, make the number any lower because it cannot account for the tremendous population changes that have occurred since 1990.

B. The District Court Here Made A Good Faith Effort To Attain Population Equality, And That Is All That Is Required By This Court's Precedents In Light Of The Minuscule Deviation That Exists.

Appellants contend that absolute population equality among the districts is an impenetrable barrier, a barrier run afoul of by the .35% population deviation in this case. In so arguing, however, appellants ignore what this Court has actually said on this issue. Appellants also ignore, once again, the actual findings of the district court upon these issues, and the court's extensive efforts to attain population equality.

Karcher v. Daggett, 462 U.S. 725 (1983), struck down a contorted New Jersey congressional redistricting plan that had a population deviation *double* the court's plan

here. Nevertheless, the fact that New Jersey's plan had a total deviation of .70% was not, by itself, a sufficient basis for a judgment of unconstitutionality. Rather, this Court held that even that deviation would be permissible iif it was the result of (1) a good faith effort to attain population equality and (2) a good faith effort to make some accommodation to other legitimate interests of the State.

> Precise mathematical equality . . . may be impossible to achieve in an imperfect world; therefore the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "as nearly as is practicable." *Karcher*, 462 U.S. at 730, quoting from *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

Rather than a rigorous straightjacket, this constitutional requirement imposes a good faith standard on a redistricting plan:

> [T]he "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

Karcher went on to discuss explicitly what this "good faith effort" meant and what kinds of considerations might warrant some population variance:

> *White v. Weiser* [412 U.S. 783 (1973)] demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts. *Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact,*

> *respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives. Id.* at 740 (emphasis added).

None of these legitimate, neutral redistricting considerations had played a role in New Jersey's reapportionment. Its reapportionment plan was horrifically contorted, giving little or no weight to considerations such as regularity, compactness, or maintaining political subdivisions. It was because of that – together with the population deviation of .70% – that the district court's judgment striking the plans as unconstitutional was affirmed.

The facts here are completely different. Not only is the total deviation in the present case *one-half* of what it was in *Karcher*, the deviation is the product of the district court's effort to adhere to legitimate, neutral, and non-racial redistricting principles such as compactness, preservation of prior district cores, respect for county boundaries, and the like. The district court went on at great length to describe how it took these factors into consideration, and how doing so produced the small deviation that exists. (U.S. J.S. 7a-11a) That is precisely the kind of good faith effort to attain population equality that this Court approved in *Karcher*.

That the appellees are correct in their reading of *Karcher* is underscored by the case of *Preisler v. Missouri*, 341 F.Supp. 1158 (W.D. Mo.), summarily aff'd sub nom, *Danforth v. Preisler*, 407 U.S. 901 (1972). The district court there approved a redistricting plan with a deviation of .63% where the reasons for those deviations were more rational than in the New Jersey case. This Court affirmed

in the Missouri case, even though the deviation was approximately double that here.

Finally, appellants should be estopped from even raising this argument because it is contrary to the position they advanced in the district court. There, the *Abrams* intervenors advocated a plan with a deviation of .93%, nearly three times as great as the court's remedy. And the *Abrams* intervenors justified that deviation under the same kind of reasoning that the district court followed here. As the intervenors' lawyer, Laughlin McDonald, stated in describing their plan:

> Now, in our plan our deviation is .93. So I did want to alert the Court that in our view that is something that the Court needs to be concerned about, but it may be removed by *Karcher* as long as you have an articulable basis for it. (Tr. 284)

Mr. McDonald went on to say, "it may well be that [the] principle of maintaining the integrity of those counties articulated, expressed and justified in the record would excuse the deviations of that .9 percent." (Tr. 284) The attorney representing the Department of Justice promptly endorsed Mr. McDonald's one-person/one-vote comments: "I agree, generally, with Mr. McDonald's assessment of one person one vote." (Tr. 396)[8] The intervenors' demographer, Selwyn Carter, went even further, testifying on direct that maintaining political subdivisions was

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[8] The DOJ attorney also went on and stated – directly contrary to their argument here (that the unconstitutional 1992 plan should be the template for a remedy plan under *Upham*) – that "several courts during the 1990 redistricting process have required that you start from scratch and adopt redistricting plans based on a clean slate." (Tr. 396)

even more important in his drafting of plans than population equality:

> Q: Did you construct the counties in the Eleventh to comply with one person one vote?
>
> A: Yes, but a more overriding reason was to keep the political subdivisions intact. I say that because sometimes when you tend to focus on keeping whole counties intact that has the effect of increasing the overall deviations of the plan. So I would say that respect for political subdivisions was the higher criteria. (Tr. 301-02)

Having taken positions below diametrically opposite their present ones, both the *Abrams* intervenors and the DOJ should be deemed to have waived this issue.

C. Even If The Appellants Were Correct, The Remedy Would Not Be To Impose One Of Their Preferred Plans, But Rather To Make Minor Adjustments In The Court's Plan.

Even if there were any merit to the appellants' one-person/one-vote argument, the remedy they hope for would not be forthcoming. It is their tactic, in complaining about a supposed population inequality, to try and force the district court to adopt one of their two black district plans. Their remedial contention is misplaced. If it were true that the district court's plan should have an even smaller population deviation, the appropriate remedy would be to remand to that court to make minor adjustments to that plan. There would be no reason to throw the entire plan out because of any issue of population equality.

IV. THE DISTRICT COURT'S REMEDY WAS NEITHER "RETROGRESSIVE" NOR VIOLATIVE OF SECTION 5 OF THE VOTING RIGHTS ACT.

The *Abrams* appellants contend that the district court's remedial plan is "retrogressive" and that it violates Section 5. While the Department of Justice did not deem this issue worthy of note in its jurisdictional statement, it now also advances such a claim in its principal brief. The argument is without merit.

A. By Its Very Terms, Section 5 Does Not Apply To The District Court's Remedy In This Case.

The express language of Section 5 would appear devoid of any ambiguity. It provides that, whenever a *"State or political subdivision"* seeks to change its voting "practice or procedures" to something different from what they were on November 1, 1964, it cannot do so without first obtaining a favorable declaratory judgment in the United States District Court for the District of Columbia or obtaining administrative "preclearance" from the Attorney General. When such judicial or administrative "preclearance" is sought, a State or local jurisdiction is generally entitled to a favorable ruling when the practice at issue is not "retrogressive." *City of Lockhart v. United States*, 460 U.S. 125 (1983); *Beer v. United States*, 425 U.S. 130 (1976).

Appellants admit that the district court's injunctive remedy here is not covered by the statute. No one suggests that the court's remedy should either be "precleared" by the Attorney General or submitted to the District Court for the District of Columbia. That is true

because the remedy is a "court ordered plan." *See, e.g., Connor v. Johnson*, 402 U.S. 690, 691 (1971).

Notwithstanding the fact that the statute does not apply here by its very terms, appellants contend that the substance of the statute should be imposed upon the district court regardless. As the DOJ puts it, this Court should force Section 5 on the district courts by making them "ascertain that the resulting plan satisfies the legal standards applicable to redistricting plans, and Section 5 provides one source of such standards." (DOJ Brief, p. 37) Appellants' argument is not one grounded in law or logic. Having had its Section 5 "black-max" strategy rejected by this Court in *Miller I*, the DOJ is simply trying now to cling to what it lost. The DOJ's newest contortion of Section 5 is nothing more than an effort to hold onto as much as possible of the gerrymanders forced on the States in 1992. Appellants' argument is lawless.

B. The Various Standards That Appellants Suggest As A "Benchmark" For Measuring Retrogression Are Arbitrary And Unjustifiable.

Appellants make all kinds of different arguments concerning what should be the "benchmark" by which retrogression should be measured in this case. The variety of suggested standards and the indefiniteness of the appellants' positions underscore how tenuous their argument is.

First, the *Abrams* appellants claim that, since the reapportionment plan for Georgia under the 1980 census contained one black majority district out of ten, a new plan could never have less than ten percent majority

black districts. Since the court's plan has one majority-minority district out of eleven, that being nine percent, appellants contend that the plan is fatally retrogressive. (*Abrams* Brief, p. 47) But to argue that the ten percent 1982 plan created a benchmark that was violated here, puts form far above substance and trivializes the great original purpose of the Voting Rights Act. While it is true that Georgia's population did increase sufficiently to allow for the addition of a new congressional representative, it was hardly "retrogressive" to devise a new plan that continued to have one majority-minority congressional district in the delegation.

Alternatively, the *Abrams* appellants argue that the "benchmark" for Section 5 should be the initial plan passed in 1991 that contained two majority black districts. This plan, of course, never went into effect because of DOJ Section 5 objections. Yet another "benchmark" that the *Abrams* appellants suggest is the supposed "state policy and goal of creating two majority black districts." (*Abrams* Brief, p. 48).

The *Abrams* appellants at least concede that the 1992 plan that has been held unconstitutional – and which contained three majority black districts – is not an appropriate Section 5 benchmark. Since that plan is illegal, and since the number of black districts was a direct product of the unconstitutional conduct of the DOJ, this should be obvious. As the *Abrams* appellants acknowledge, "[t]here is no state or federal policy that is advanced by using an admittedly unconstitutional plan as a benchmark." *Id.* at 47. But for the same reason, any use of the 1991 plan must fail. The majority black eleventh congressional district in

that plan suffered the same kind of DOJ-originated infirmity as the final 1992 plan. Moreover, since the plan never went into effect because of the DOJ's Section 5 objection, it was never "legally enforceable" and could not, by law, constitute a benchmark under the DOJ's Section 5 regulations. (*See* 28 C.F.R. § 51.54(b)(1) and Order at U.S. J.S. 27a & note 20.) *See also Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971).

Moreover, appellants' assumption that the Section 5 benchmark standard imposes an iron-clad, impenetrable barrier is misplaced. Because the district court found that no additional majority-minority congressional districts could be drawn that were reasonably compact, and none could thus be drawn without unconstitutional gerrymandering, Section 5 could not possibly mandate the drawing of such a district. *See, e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (holding that even a retrogressive change is permissible under Section 5 if there are good governmental reasons warranting the change). To suggest that Section 5's retrogression standard demands that a State engage in unconstitutional redistricting is insupportable. To so construe Section 5 would render it unconstitutional.

The "benchmark" the DOJ contends should be imposed on the district court is telling. While the *Abrams* appellants are not so bold as to suggest that the final 1992 plan should be a benchmark, and the DOJ does not say quite that, the DOJ advocates the next closest thing. According to the United States, the district courts should be required by Section 5 to come as close to the unconstitutional plan as possible. The DOJ would read the law to permit only that most minimal reduction in racial

gerrymandering that is absolutely mandated by the Constitution, and nothing more. As the Department would have it, the 1992 plan would be the benchmark, with one modification:

> [I]nsofar as a reduction in minority voting opportunities is necessary to satisfy the Constitution, that reduction does not violate the principles of Section 5. . . . For that reason, legally significant retrogression would occur only insofar as a new plan reduces minority voting opportunity more than necessary to correct the constitutional defects of the 1992 Plan. (DOJ Brief, p. 40)

The excesses of the DOJ under Section 5 have been laid bare in recent years by decision after decision, both in this Court and in the district courts. The present argument makes clear that the DOJ remains wholly unrepentant. Having flouted the clear meaning of Section 5 during the 1991-92 reapportionment in order to force contorted plans on Georgia and other states, the DOJ now suggests a new construction of Section 5 – one crafted out of whole cloth – in an effort to salvage as much of its unconstitutional gerrymanders as it possibly can. More should be expected of the Solicitor General of this Nation.

Were the inapplicability of Section 5 not apparent from the face of the statute itself – as well as this Court's prior decisions – the wholesale randomness of appellants' suggested benchmarks would be reason enough to reject transplanting the statute to this environment. *See Holder v. Hall*, 129 L.Ed.2d 687 (1994). Section 5 was designed to be a quick, expedient way of allowing review of changes in covered election laws. But imagine what would ensue

if the DOJ's suggested standard would apply, requiring the district court to impose that one redistricting plan that fell just one iota short of being an unconstitutional gerrymander. What would be, in the Department's view, "just under" unconstitutional? Two majority black districts, and two more with at least a thirty-five percent black population? Or one more with a thirty-five percent black population? Or one more with a forty percent black population? The answer would be left entirely to the whims of the Civil Rights Division staff attorneys, unguided by anything remotely akin to principle.

CONCLUSION

For the reasons stated herein and otherwise appearing on the record in this case, appellants respectfully request that the judgment of the district court be affirmed.

Respectfully submitted,

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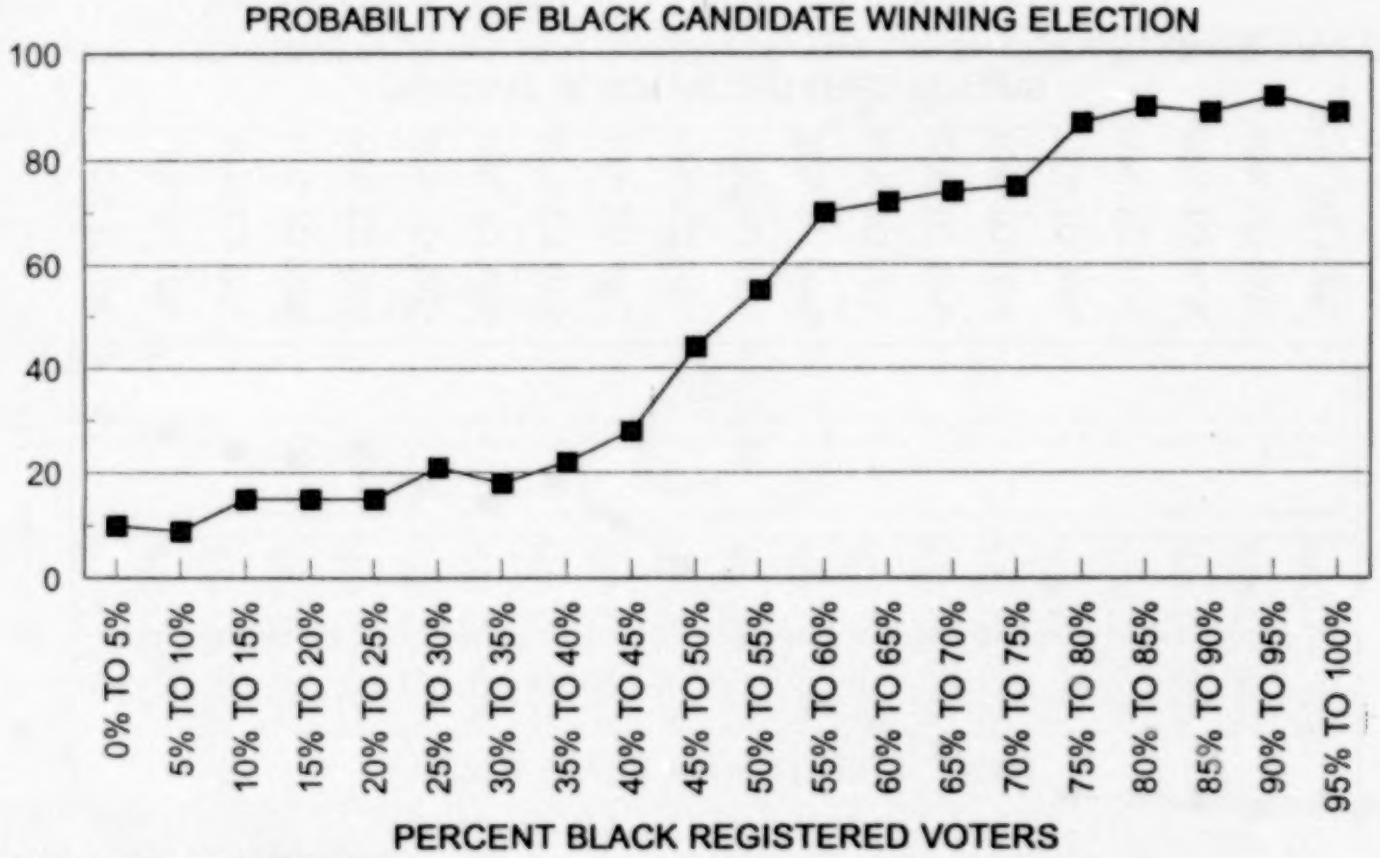

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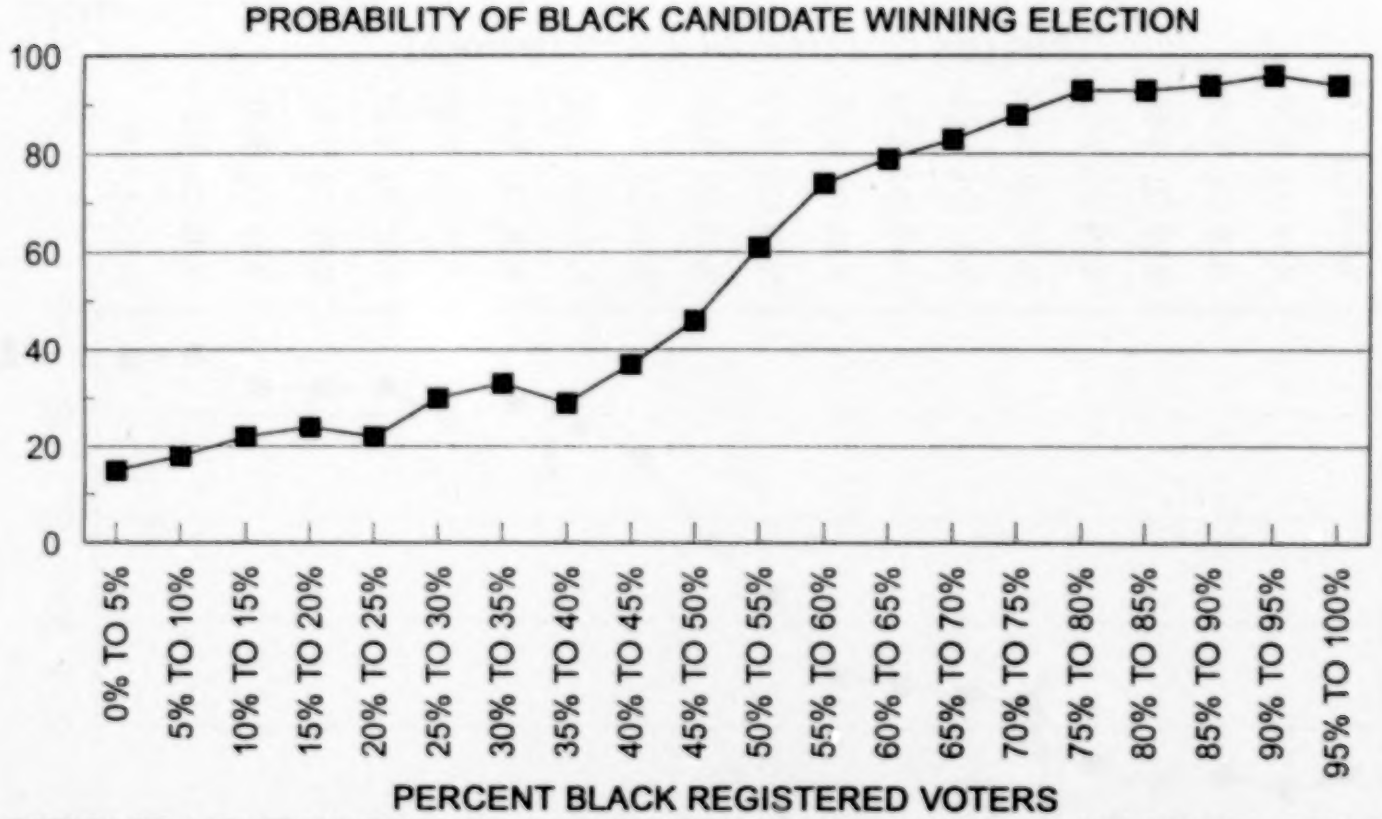

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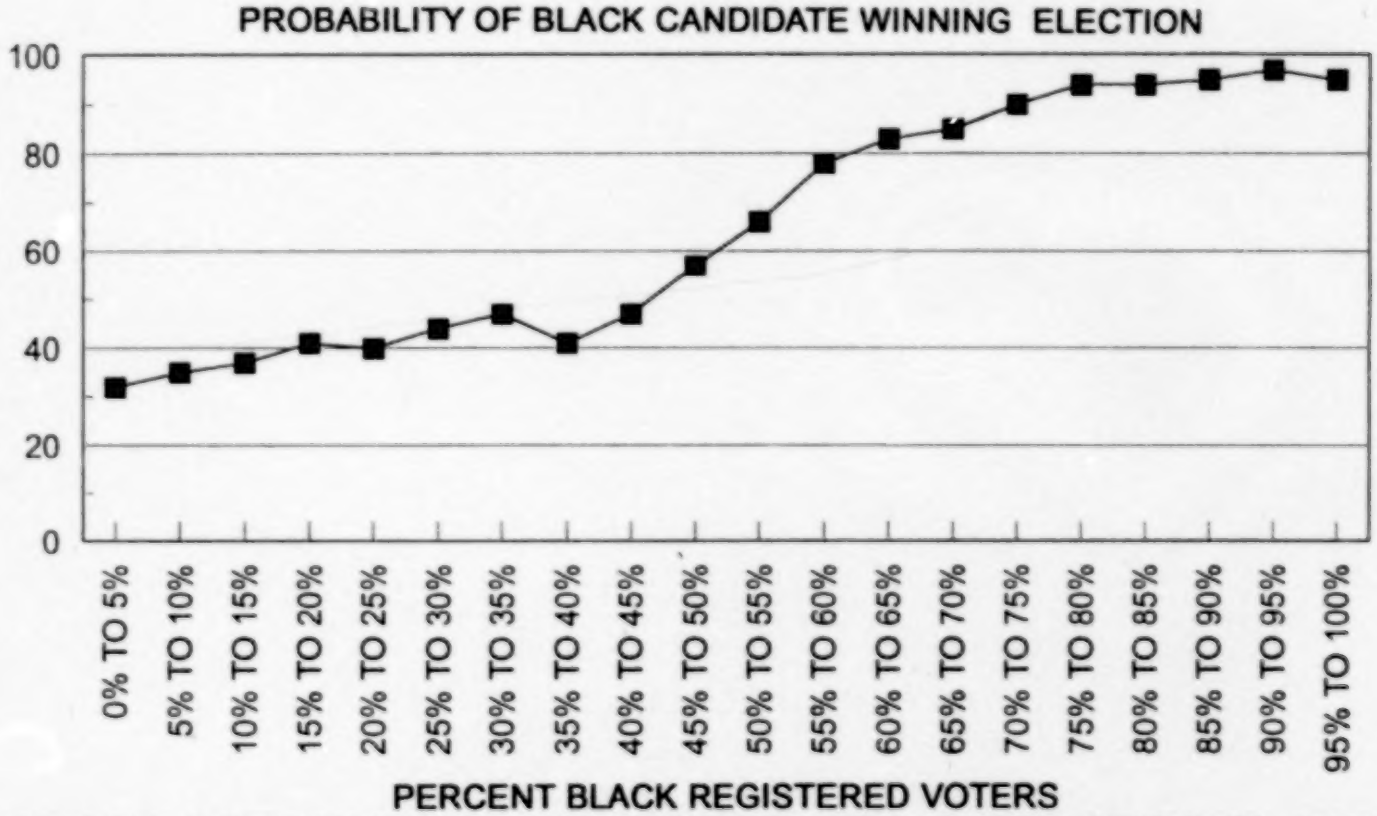

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